

TRUONG (Migration) [2024] AATA 680 (26 February 2024)

1.

2.

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Mrs Thi Kieu Oanh TRUONG
Miss Truong Kieu Thao PHAN
Miss Truong Minh Hieu PHAN
Mr Truong Minh Duc PHAN

REPRESENTATIVE: Mr David Nguyen

CASE NUMBER: 1900643

HOME AFFAIRS REFERENCE(S): BCC2016/2408172

MEMBER: Ann Duffield

DATE: 26 February 2024

PLACE OF DECISION: **Canberra**

DECISION: The Tribunal remits the applications for Partner (Temporary) (Class UK) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 820 (Spouse) visas:

- Public Interest Criterion 4020(1) for the purposes of cl 820.226 of Schedule 2 to the Regulations
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Statement made on 26 February 2024 at 2:22pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – false or misleading information in a material particular – previous visitor visa application – marital status – separated but still living together – partner visa application – contradictory statements – decision under review remitted

3.

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, cl 820.226; Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 8 January 2019 to refuse to grant the applicants Partner (Temporary) (Class UK) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
5. The applicants applied for the visas on 19 July 2016. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl 820.226 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the primary applicant did not meet Public Interest Criterion (PIC) 4020(1). The delegate found that she had given, or caused to be given, information that is false or misleading in a material particular in relation to the visa application and in relation to a visa that the applicant held in the period of 12 months before the application was made.
6. The applicants were represented in relation to the review.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

BACKGROUND

8. The applicant is a citizen of China born in June 1967. The three secondary applicants are her children aged 29-21 years who are currently temporary residents in Australia.
9. The applicant first met her current Husband, Mr Van Dinh Nguyen in December 2014 and committed to a long-term relationship in January 2016 after they had visited each other several times in Australia and Vietnam. They were married on 25 June 2016 in Australia.
10. In her visitor visa application dated 24 December 2015, the applicant declared that she was visiting her children who were studying in Australia. She also declared that she was married to Mr Phan Minh Kinh, who resided with her in Vietnam, at the time of her application, and provided a copy of her marriage certificate. In a subsequent statement dated 18 December 2018, however, she stated that she and Mr Kinh were divorced on 5 May 2016.
11. Also in the first visitor visa application lodged in May 2015, the applicant provided a copy of a curriculum vitae stating that she resided with Mr Kinh and her three children at the same named address. This CV is dated 6 May 2015.
12. With her second visitor visa application dated 24 December 2015. The applicant also provided copies of her Vietnamese household registration book dated 25 August 2016 which include Mr Phan Minh Kinh as her husband.
13. She lodged the application subject to this review on 19 July 2016. It was refused on 8 January 2019.
14. *Vulnerable persons guidelines*
15. The Tribunal is mindful that the applicant has declared that she has suffered serious mental health issues in the past relating to her previous marriage. Reports from mental health professionals also support this and she continues to receive ongoing support.

CONSIDERATION OF CLAIMS AND EVIDENCE

16. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 820.226 for the grant of the visa. Broadly speaking, this requires that:
- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
17. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

18. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
19. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
20. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

21. *False and misleading information – visitor visa applications June and December 2015*

22. In her visitor visa application dated 25 May 2015 and 24 December 2015, the applicant declared that she was visiting her children who were studying in Australia. At question 9 in the applications she declared her relationship status as “married”. She declared that she was married to Mr Phan Minh Kinh, who resided with her in Vietnam, at the time of her application, and provided a copy of her marriage certificate. In a subsequent statement dated 18 December 2018, however, she stated that she and Mr Kinh were divorced on 5 May 2016 and were separated but still residing together at the time. There is an option at question 9 in the visitor visa application to indicate “separated”. The applicant did not tick this box in either application.
23. Also in the first visitor visa application lodged in May 2015, the applicant provided a copy of a curriculum vitae stating that she resided with Mr Kinh and her three children at the same named address. This CV is dated 6 May 2015.
24. With her second visitor visa application dated 24 December 2015. The applicant also provided copies of her Vietnamese household registration book dated 25 August 2016 which include Mr Phan Minh Kinh as her husband.
25. The Tribunal has considered whether the information provided by the applicant in her visitor visa applications was ‘information that is false or misleading in a material particular’ as defined in PIC 4020(5), i.e. information that is:
 - a. false or misleading at the time it is given, and
 - b. relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.
 - i. in relation to the visa application or a visa held in the 12 months before the visa application was made.
26. The application for the partner visa was lodged by the applicant in July 2016 and she was still the holder of the relevant visa at the time of that application.

27. *False and misleading information in relation to the lodgement of the partner visa application*

28. The delegate also found that the applicant had provided false and misleading information in relation to her partner visa application which was lodged in July 2016. That information is as follows.
29. In a statutory declaration signed by the applicant dated 23 June 2016, she states that she and Mr Minh Kinh Phan were formally separated on 1 February 2013 and divorced on 27 April 2016. She declares that she last saw her ex-spouse in February 2013. This information is inconsistent with her subsequent statement of 18 December 2018 where she states that she and her ex-spouse remained living together but not as spouses until she departed for Australia.

30. *Findings and reasons*

31. The applicant and her Australian citizen husband separated in March 2023. The applicant claims that this was the result of family violence perpetrated against her by the sponsor.

32. The Tribunal has not made an assessment about whether the applicant and her sponsor were in a genuine spousal relationship at the time of application or at the time of this decision. It has not made an assessment as to whether their separation was by reason of family violence. That is not within the scope of the Tribunal's remit in this matter. That is an assessment for the department to make.

33. *Visitor visa application*

34. The applicant states, through her representative that she did not provide false and misleading information on her two visitor visa applications as the applicant was not divorced until 5 May 2016. She was, therefore, technically still married. She states further that there is no documentation available to support a claim that she and her husband at the time were "separated".

35. The Tribunal has considered that response and accepts that a person could reasonably be confused in relation to what was required of her by the information she provided in the visitor visa application forms. It is not clear for example that a person's relationship status has any bearing on an application for a visitor visa, and she may well have formed a view that rather than confuse matters given the transition between separation and divorce she has opted for the simpler option and declared herself married, which she legally was. The applicant clearly had formed a view that some kind of supportive documentation was required, and she, or someone acting on her behalf, has, in the Tribunal's mind sought merely to minimise confusion with no intention to mislead or provide false information.

36. The applicant submits that the forms were incorrectly completed and submitted by an unlicensed, incompetent, and unregistered migration agent in Vietnam and blames some mistakes in translation and interpretation. She has not provided any evidence of this and in any case, the applicant has signed the application forms on two occasions and indicated that the information she has supplied is complete, correct and up to date in every detail.

37. The Tribunal has considered the circumstances of both the applications and finds that the information provided at the time of application may be considered to be lacking in nuance given that the applicant was in the midst of a complicated separation which required her to remain at home but not in a spousal relationship, and a divorce. The Tribunal is not persuaded that there was any deliberate fraud or intention to mislead, by either the applicant or anyone acting on her behalf, or that it had any material effect on the decision to grant the visa.

38. Departmental records indicate that neither the applicant, nor any of her children, have ever been in breach of their visa conditions or failed to comply with those conditions in any way. They have not given the department any reason to consider them unreliable. Her children have been resident in Australia for many, many years and applied for and received numerous visas. The department has not found those applications to have contained any incorrect information. It follows that, in the Tribunal's mind, the applicant felt no need to seek to deceive the department in her application for the visitor visas.

39. The relevant question before the Tribunal is whether the information was "false or misleading in a material particular" in the context of PIC 4020, there must be a visa criterion upon which the allegedly false information could materially bear. The question therefore is whether it is relevant to any of the criteria the Minister may consider when deciding on an application, whether or not the decision is made because of that information.

40. DHA's policy, set out in its Procedural Instructions, refers to PIC4020 as 'The Integrity PIC' and states: 'Fraud within the Visa and Citizenship Programmes is a high risk for the Department. People may present bogus documents, conceal information, or provide false or

misleading information where they would otherwise fail to meet the criteria for a visa. They may commit fraud to facilitate people smuggling, human trafficking, drug trafficking or terrorist operations. In order to manage the risks, appropriate mitigation strategies must be in place. Public interest criterion (PIC) 4020 is intended to significantly increase the level of integrity in visa applications by providing a strong disincentive to those considering giving, or causing to be given, a bogus document or information that is false or misleading in a material particular.'

41. In considering this matter the Tribunal has had regard to the requirements for the grant of a tourist visa. Whilst the variables which are considered when assessing an application may be evident to the department, these are not evident to the applicant. For example, the department may take into account an applicant's employment and financial circumstances along with the economic situation in an applicant's home country or usual country of residence; they may consider social unrest or conflict in an applicant's home country or usual country of residence and whether there are incentives for them to return to their home country, their ties to Australia and incentives to remain.
42. Its not clear to the Tribunal, and unlikely to have been clear to the applicant, why providing the information she did in relation to her relationship status, in and of itself and in the context of all the other variables, would have made a material difference on the outcome of the application.
43. The Tribunal is not satisfied that the applicant deliberately provided false and or misleading information to the department in relation to two visitor visa applications made in May and December 2015.
44. The Tribunal is therefore satisfied that the applicant meets the requirements of 4020(1).

45. *Partner visa application*

46. The Tribunal has assessed whether the applicant has failed to meet the requirements of PIC4020(1) because she made apparently contradictory statements in relation to when she "saw" her ex-husband. In one statement she declares that the last time she saw her ex-husband was on 1 February 2013 and then subsequently stated that they lived together in the same house but not as husband and wife.
47. In the Tribunal's mind, the reason for refusing an application for a partner visa on the basis of confusion over when a person "saw" another person, particularly in the context of the applicant's complicated separation and divorce, and all the other evidence before the delegate has not been made out.
48. There must also be a there must be a visa criterion upon which the allegedly false information could materially bear. The delegate has not explained what that is and the Tribunal cannot identify one.
49. It's not clear to the Tribunal, and unlikely to have been clear to the applicant, why confusing evidence about when she last saw her ex-husband, could make a material difference on the outcome of the application. It has not been demonstrated that the applicant's statement was intended to be deliberately false or misleading or how it could be seen as such. In and of itself and in the context of all the other variables, the Tribunal is not satisfied that such information was false and/or misleading in any way, or that it would have made a material difference on the outcome of the application.
50. The Tribunal is not satisfied that the applicant provided false and/or misleading information in relation to her partner visa application lodged on 19 July 2016.

51. Therefore, the applicant meets PIC 4020(1).

52. **CONCLUSION**

53. On the basis of the above, the applicant satisfies PIC 4020(1) for the purposes of cl 820.226.

DECISION

54. The Tribunal remits the applications for Partner (Temporary) (Class UK) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 820 (Spouse) visas:

- Public Interest Criterion 4020(1) for the purposes of cl 820.226 of Schedule 2 to the Regulations

Ann Duffield
Senior Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...